

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1422

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

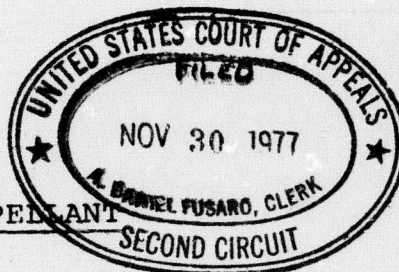
Appellee,

-against-

Docket No. 77-1422

DENNIS W. MULLIGAN,

Appellant.



BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT OF
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
NEW YORK

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TABLE OF CONTENTS

	Page
Table of Cases and Other Authorities.....	i
Questions Presented.....	1
Statement Pursuant to Rule 28(3)	
Preliminary Statement.....	1A
Statement of Facts.....	1A
Argument	
I. APPELLANT'S CONSTITUTIONAL AND STATUTORY FAIR TRIAL RIGHTS WERE VIOLATED BY THE PREJUDICE, INCOMPETENCY AND MISCONDUCT OF ONE OF THE JURORS..	17
II. THE DISTRICT COURT ERRED IN REFUSING TO ALLOW THE JURY TO CONSIDER THOSE PORTIONS OF APPELLANT MULLIGAN'S GRAND JURY TESTIMONY WHICH WERE ALLEGED TO BE PERJURIOUS IN THE CONTEXT OF THE REST OF HIS TESTIMONY.....	35
III. THE DISTRICT COURT ERRED IN WITHDRAWING TWO OF THE ELEMENTS OF THE CRIME OF PERJURY FROM THE JURY'S CONSIDERATION.....	40
Conclusion	
FOR THE ABOVE-STATED REASONS, THE VERDICT SHOULD BE SET ASIDE AND THE CASE REMANDED FOR A NEW TRIAL	43

TABLE OF CASES

	Page
<u>Affronti v. United States</u> , 145 F.2d 3 (8th Cir.1944).....	37, 38
<u>Baker v. Hudspeth</u> , 129 F.2d 779 (10th Cir.1942).....	18
<u>Byrd v. United States</u> , 342 F.2d 939 (D.C.Cir.1965).....	41
<u>Carpenter v. United States</u> , 100 F.2d 716 (D.C.Cir.1939).....	19
<u>Clark v. United States</u> , 289 U.S. 1 (1933).....	32
<u>Delmore v. Brownell</u> , 135 F.Supp. 470 (D.C.N.J.1955).....	38
<u>Dennis v. United States</u> , 339 U.S. 162 (1950).....	18
<u>Farese v. United States</u> , 428 F.2d 178 (5th Cir.1970).....	18
<u>Frazier v. United States</u> , 335 U.S. 497 (1948).....	19
<u>Gomila v. United States</u> , 146 F.2d 372 (5th Cir.1944).....	18
<u>Hoeffner v. Western Leather Clothing, Co.</u> , 161 S.W.2d 722 (Mo.1942).....	38
<u>Illinois v. Hurry</u> , 52 N.E. 2d 173 (Ill.1943).....	39
<u>Jackson v. United States</u> , 395 F.2d 615 (D.C.Cir.1968).....	19, 23, 32
<u>Jordan v. Massachusetts</u> , 225 U.S. 167 (1912).....	32
<u>Mares v. New Mexico</u> , 490 P.2d 667 (New Mexico, 1971).....	18
<u>Mikus v. United States</u> , 433 F.2d 719 (2d Cir.1970).....	32
<u>Nevada v. Skaug</u> , 161 P.2d 708 (Nev.1945).....	39
<u>North Carolina v. Coffey</u> , 44 S.E.2d 886 (N.Carol.1947).....	39
<u>North Carolina v. Justice</u> , 165 S.E.2d 47 (N.Carol.1969).....	39
<u>North Carolina v. Kelly</u> , 6 S.E.2d 533 (N.Carol.1940).....	39
<u>Parker v. Benson</u> , 385 U.S. 363 (1966).....	18
<u>Philadelphia & R. Ry Co. v. Bartsch</u> , 9 F.2d 858 (2d Cir.1925)	37

	Page
<u>Remmer v. United States</u> , 347 U.S. 227 (1954).....	32
<u>Sheppard v. Maxwell</u> , 384 U.S. 333 (1966).....	18
<u>United States ex rel. DeVito v. McCorkle</u> , 248 F.2d 1 (3d Cir.1957).....	32
<u>United States ex rel. Owen v. McMann</u> , 435 F.2d 813 (2d Cir.1970).....	32
<u>United States v. Angelo</u> , 153 F.2d 247 (3d Cir.1946).....	37
<u>United States v. Brown</u> , 179 F.Supp. 478 (D.C.D.C.1960).....	18
<u>United States v. Capaldo</u> , 402 F.2d 821 (2d Cir.1968).....	38
<u>United States v. Clark</u> , 475 F.2d 240 (2d Cir.1973).....	41, 43
<u>United States v. Dickerson</u> , 508 F.2d 1216 (2d Cir.1975).....	41
<u>United States v. Dioguardi</u> , 492 F.2d 70 (2d Cir.,1974).....	18, 19
<u>United States v. Fields</u> , 466 F.2d 119 (2d Cir.1972).....	41, 43
<u>United States v. Floyd</u> , 496 F.2d 982 (2d Cir.1974).....	32
<u>United States v. Hand</u> , 472 F.2d 162 (5th Cir.1973).....	32
<u>United States v. Hill</u> , 332 F.2d 105 (7th Cir.1964).....	18
<u>United States v. Howard</u> , 506 F.2d 1131 (2d Cir.1974).....	41, 43
<u>United States v. Johnson</u> , 165 F.2d 42 (3d Cir.1947).....	38
<u>United States v. Katz</u> , 78 F.Supp. 435 (D.C.Pa.1948).....	37, 38
<u>United States v. Lampkin</u> , 66 F.Supp. 821 (S.D.Fla.1946).....	32
<u>United States v. Maggio</u> , 126 F.2d 155 (3d Cir.1942).....	37
<u>United States v. Muncy</u> , 526 F.2d 1261 (5th Cir.1976).....	19
<u>United States v. Pravato</u> , 505 F.2d 703 (2d Cir.1974).....	42
<u>United States v. Rakes</u> , 74 F.Supp. 645 (D.C.Va.,1948).....	19, 37
<u>United States v. Rattenni</u> , 480 F.2d 195 (2d Cir.1973).....	18, 33, 34

	Page
<u>United States v. Rosenblum</u> , 339 F.2d 473 (2d Cir.1964).....	38
<u>United States v. Silverman</u> , 449 F.2d 1341 (2d Cir.1971).....	32
<u>United States v. Weinbren</u> , 121 F.2d 826 (2d Cir.1971).....	38
<u>Williams v. Maryland</u> , 109 A.2d 89 (Md.1954).....	39

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

Appellee,

-against-

Docket No. 77-1422

DENNIS W. MULLIGAN,

Appellant.

QUESTIONS PRESENTED

1. Whether appellant's constitutional and statutory fair trial rights were violated by the prejudice, incompetency and misconduct of one of the jurors?
2. Whether the district court erred in refusing to allow the jury to consider those portions of appellant's grand jury testimony which were alleged to be perjurious in the context of the rest of his testimony?
3. Whether the district court erred in withdrawing two of the elements of the crime of perjury from the jury's consideration?

STATEMENT PURSUANT TO RULE 28(3)

PRELIMINARY STATEMENT

This appeal is from a judgment of the United States District Court for the Southern District of New York (The Honorable Richard Owen) rendered September 6, 1977 after a jury trial, convicting appellant of one count of perjury in violation of 18 U.S.C. §1621. Appellant was sentenced to two years imprisonment.

STATEMENT OF FACTS

Appellant Mulligan and his co-defendant, John Cerasani, were both indicted for conspiracy to commit bank robbery (count 1) and bank robbery (count 2). Mr. Mulligan was also charged with two counts of perjury before the grand jury (counts 3 and 5).¹

The defendants were first tried on these charges in March, 1977, before Judge Knapp. That jury deadlocked seven to five (transcript of the first trial at 1634-6),² and the trial judge declared a mistrial (Id. at 1638-40).³

The case was then transferred to Judge Owen, who began the second trial on June 7, 1977. That jury, after remaining deadlocked on all counts through two days of deliberations and an Allen charge

1. A copy of the indictment is set forth in appellant's separate appendix at 005. Counts four, six and seven were redacted prior to trial.

2. This portion of the transcript of the first trial is set forth in appellant's separate appendix at 366-368.

3. See appellant's separate appendix at 370-372.

(1700),⁴ convicted appellant Mulligan of the perjury charged in count 3 of the indictment (1706). A mistrial was declared as to the other counts (1707).

Most of the evidence presented at trial pertained to the bank robbery charges on which the jury was unable to reach verdicts. That evidence will only be summarized in the following paragraphs so as to enable this Court to view the issues in this appeal in the context of the proceedings below.

The government's case relied heavily on the testimony of Frank Smith and Martin Shannon, two individuals who admitted committing the bank robbery charged in the indictment. Thus, the prosecutor essentially conceded in both his opening and closing arguments that the jury would have to believe Smith and Shannon's testimony in order to convict the defendants on the bank robbery charges (28, 1374, 1390).

At the time of trial, Smith was sixty-nine years old (187) and Shannon, approximately fifty-seven (615-16). They had been friends all their lives and partners in a wide range of criminal activities (198, 616). In 1971, both men were recruited by another friend,

⁴. Numbers in parentheses, unless otherwise identified, refer to pages of the transcript of the second trial. This transcript was docketed as part of the record on appeal also set forth in appellant's separate appendix.

Joseph Gernie, to participate in a series of attempted robberies, most of which were unsuccessful (199, 616-20). Over the next few months, one or both of these men participated in an unsuccessful attempt to rob a bank at 81st and Broadway (200-210), an unsuccessful attempt to rob a housing project payroll (211-16), an unsuccessful attempt to rob an armored car at Pier 42 on the East River (216-19), an initial unsuccessful attempt to rob the First National City Bank at York Avenue and 71st Street (219-222) and finally, the successful robbery of that same bank on December 10, 1971 (223-35).

Several years after that robbery, Smith was arrested while participating in another armed bank robbery in Livingston, New Jersey (189). While he was out on bail awaiting trial for that robbery, Smith robbed two more banks and then fled to Florida (191-2). In August, 1975 he was re-arrested in Florida and returned to New Jersey.

At that time, Smith began making efforts to convince the prosecutor to offer him a "low plea" in return for his cooperation (193, 278). In promoting this deal, Smith claimed, among other things, that he could involve a New York City police officer in the robbery of the First National City Bank at York and 71st Street on December 10, 1971.

The deal was made, and Smith was permitted to plead to one charge of conspiracy in satisfaction of all of ten bank robberies and other crimes he had committed in recent years (193-4). His final sentence

on that charge was three years (196-8).

Shortly after Smith made his deal, federal authorities arrested Shannon (673). Although he initially denied Smith's allegations (673-4), Shannon was eventually convinced to corroborate Smith in return for a deal similar to the one Smith had received (608-9. Federal authorities intervened to prevent the parole Shannon was on from being violated (731-34). At the time of trial, Shannon was still awaiting sentence. He expected that as a result of his testimony in this case, he would not be sentenced to any incarceration, despite his long history of criminal activities (755).

In accordance with the claims they made to secure their deals with the government, Smith and Shannon provided incriminating testimony for the government in this case against a New York City police officer, appellant Mulligan. They portrayed Mulligan as Gernie's tipster, who provided them with inside information about the banks they were to rob (200). As to the aborted robbery of the bank at 81st Street and Broadway, Smith claimed that co-defendant Cerasani accompanied him and Gernie to the bank and that appellant Mulligan, waiting one block away, was responsible for making an emergency telephone call to the police for purposes of drawing the patrol cars in the area away from the anticipated robbery. (205-10). He claimed that Mulligan was the driver and Cerasani, an accomplice, in their unsuccessful attempt to rob a housing project payroll (210-16).

According to Smith, Cerasani next planned the aborted robbery of the armored truck (216-19).

As to the robbery of the bank on 71st Street and York Avenue, Smith and Shannon claimed that appellant Mulligan, through his participation in prior surveillance of that bank, had learned that \$100,000 would be in the bank on December 10, 1971 (219-20). On that day, Smith and Shannon went to 71st Street and York Avenue, where they supposedly met Cerasani and observed appellant Mulligan across the street (223-25). Smith and Cerasani then entered and robbed the bank while Shannon waited outside (225-6). Appellant Mulligan supposedly made a call to draw patrol cars in the area away from the bank during the robbery (227). Afterwards, Shannon supposedly went with Mulligan and Cerasani to an apartment in Queens belonging to Mulligan's girlfriend to divide up the proceeds of the robbery (231-2).

Smith and Shannon were the only witnesses to testify that appellant Mulligan and co-defendant Cerasani were in any way involved in this bank robbery. The government was able to corroborate only collateral aspects of their testimony. Consequently, the possibility that they were falsely incriminating a New York City police officer in order to enhance their own value to the government and thereby avoid lengthy prison sentences had to be carefully considered by the jury. That possibility, coupled with past records encompassing a virtually uninterrupted series of serious crimes

spanning almost half a century; the fact that they had admitted making false statements about this case and other matters; and the fact that their testimony contradicted themselves, each other and independent evidence in the case, all rendered their testimony highly suspect. The jury, in deadlocking eleven to one in favor of acquittal on the bank robbery charges,⁵ clearly found them to be incredible witnesses.

Counts three and four of the indictment charged that appellant Mulligan had committed perjury when he testified before the grand jury that he did not recognize the name "John Cerasani" or "Baba" (count 3) and that he did not recognize the names "Frank Smith" or "Martin Shannon" (count 4). The government relied for proof of these claims on the testimony of Smith and Shannon that appellant Mulligan had participated in the criminal activities they described and therefore knew these individuals. In support of count three, the government also introduced telephone company records indicating that a telephone call had been made from Cerasani's apartment to Mulligan's house on April 21, 1976 (487-508). No evidence was introduced to show what person placed or received this call, or to establish that the call had originated from Cerasani's apartment as opposed to some other point along the line between his apartment and the telephone company station.

⁵ . See e.g. letter of Juror Stephenson, appellant's separate appendix at 078.

When the government sought to introduce the grand jury testimony which formed the basis for these charges, defense counsel repeatedly requested that the jury be permitted, as they had at the first trial,⁶ to evaluate the questions and answers alleged to be perjurious in the context of the rest of appellant Mulligan's grand jury testimony (963, 966, 968, 994-5, 999-1000, 1000-1005). The trial court denied these requests and allowed the jury to hear little more than the questions and answers set forth in the indictment (963-68, 994-1005).⁷

Thereafter, the court, in instructing the jury as to the perjury charges, removed two elements of the crime from the jury's consideration:

Now, let's go to Counts three and Four which are the perjury counts and are asserted against Mr. Mulligan alone.

In those, he is charged with violating Section 1623 of Title 18, which provides in part, "Whoever under oath in any proceeding before any grand jury of the United States knowingly makes a false material declaration" is guilty of a crime.

In order to sustain the burden of proof against Mr. Mulligan under either of the perjury counts of the indictment, the government must establish beyond a reasonable doubt the following essential elements:

1. That Mr. Mulligan took an oath to testify truthfully before a United States grand jury in the Southern District;
2. That he made false statements as to matters about which he testified under oath are

6 . This portion of the transcript of the first trial is set forth in appellant's separate appendix at 361.

7 . Appellant Mulligan's grand jury testimony is set forth in its entirety in appellant's separate appendix at 336.

The only portion of the grand jury testimony which the trial court allowed the jury to consider is set forth in appellant's separate appendix at p.340, line 2, p.342 line 18 and p.347 line 9, p.348 line 12.

charged in the indictment;

3. That those false statements were wilfully made in that at the time he made them he knew them to be false;

4. As to the matters which it is charged he made false statements, those matters were material to the issues under inquiry by that grand jury.

Simply stated, ladies and gentlemen, perjury is the wilful giving of false testimony knowing it to be false as to a material matter before a competent tribunal under oath.

The law recognizes no excuse or justification for perjury. The witness is compelled by law to testify truthfully under oath before a competent tribunal such as the grand jury.

In this case, as the evidence shows, and there is no serious dispute, Mr. Mulligan did appear before a grand jury for the Southern District of New York and took an oath that he would testify truthfully and that such grand jury was authorized by law to administer oaths.

The government contends the evidence shows that the defendant gave the testimony which he is alleged in the indictment to have given. I charge you as a matter of law that the matters as to which Mr. Mulligan was asked as set forth in the indictment were material to the issues under inquiry before the grand jury before which the testimony was given. Therefore, you need not concern yourself with either the first or the fourth elements with which I have just outlined for you. You should direct your attention to the second and the third elements that I have outlined and they raise the following questions for you to consider with respect to Counts Three and Four of this indictment.

1. Was any part of the testimony given by defendant Mulligan as set forth in each of those counts false?

2. Did Mr. Mulligan give any part of the testimony knowing at the time that it was false?

Now, the government satisfies its burden of proving the falsity of the testimony in a particular count if you find beyond a reasonable doubt that any part of that testimony cited in in that count is false. The counts in the indictment charging perjury contains answers given by the defendant Mulligan reciting more than one fact. It is not necessary that the government prove that each of these factual statements is false. But it is sufficient if the government proves beyond a reasonable doubt that at least one factual statement in each count is false.

(1646-1649)⁸

The jury convicted appellant Mulligan only of the perjury charged in Count 3. On September 6, 1977, he was sentenced to two years incarceration.

The facts relating to the juror misconduct issue.

One of the individuals selected from the panel to sit on the jury in this case was Virginia Stephenson. Unbeknownst to the defense, Ms. Stephenson had a history of factors which made her undesirable as a juror, particularly in the trial of a New York City police officer.

On November 15, 1973, Ms. Stephenson, angered at the fact that post office trucks at a post office building near her apartment were polluting the atmosphere, went to the post office to register

⁸ . This portion of the judge's charge is set forth in appellant's separate appendix at 042.

a complaint. When she attempted to enter the truck loading area, she was stopped by a postal security guard, and a mailhandler, Joseph Scelza, who told her she would have to go to a different entrance to see the supervisor about her complaint. Ms. Stephenson refused, and attempted instead to push past the postal employees, scratching Scelza on the face and stabbing him in the back of the head with a ballpoint pen. Scelza had to be taken to Bellevue Hospital for treatment, which included stitches. (These facts are set forth in the decision of Judge LaFauci, appellant's separate appendix at 282-285).

As a result of this altercation, Ms. Stephenson was arrested by New York City Police and charged with a felony assault (a copy of the arrest report is set forth in appellant's separate appendix at 253, and the felony complaint at 258). She was searched, fingerprinted and held overnight by members of the New York City Police department at the 17th Pct. (See arrest report, appellant's separate appendix at 253). The following day, she was taken to Criminal Court by a police officer and arraigned on his sworn complaint (see transcript of Criminal Court proceedings, appellant's separate appendix at 255.)

The criminal charges were eventually dismissed because Scelza was never advised as to when he was supposed to appear in court (see appellant's separate appendix at 262-66). Thereafter, Scelza filed and successfully prosecuted a civil action against Ms.

Stephenson for the injuries he suffered from her assault. Ms. Stephenson filed a counterclaim in that proceeding and testified under oath at the trial that Scelza had punched her in the stomach and chased her down the street. The trial judge found Ms. Stephenson's testimony "incredible". He denied her counterclaim, and awarded judgment to Scelza. (The judge's decision is set forth in appellant's separate appendix at 282-5).

At the beginning of the voir dire in this case, the prospective jurors were advised that those selected for this jury would be sitting in judgment over a member of the New York City Police Department (voir dire minutes, June 7, 1977, at 11-12). When the prospective juror immediately before Ms. Stephenson was asked whether he had ever been a defendant in a criminal proceeding, he answered that he had been charged with crimes twice, but that neither charge had resulted in a conviction. (This portion of the voir dire is set forth in appellant's separate appendix at 083-4). That individual was excused from the jury panel (Id. at 090). Moments later, when Ms. Stephenson was asked whether she had "ever been involved in a criminal case," she concealed her arrest and detention by members of the New York City Police Department, answering the question with an unqualified "No sir." (Id. at 092). Similarly, although she had been criminally charged and civilly sued for assaulting a United States postal employee, she denied at the voir dire having ever

had "any disputes with the United States." (Id. at 092). Finally, although she had testified under oath in the civil court proceeding that she had been chased and punched in the stomach by Mr. Scelza and then falsely arrested by the New York City Police she stated at the voir dire that she had never been the victim of a crime (Id. at 092). Mr. Stephenson also failed to disclose at any time during the voir dire examination that she had been under psychiatric treatment for five years.⁹

During the trial, Ms. Stephenson developed an infatuation for the assistant United States Attorney prosecuting the case. (see Stephenson letter, appellant's separate appendix at 078-81). On one occasion, she blew a kiss toward the prosecution table as the jury was leaving the courtroom. (See appellant's separate appendix at 114-15). She conceived a plan whereby with the help of the prosecutor she would write a book about the government's chief witness, Frank Smith (Id. at 078). Rather than concentrating on the evidence, she was preoccupied during the trial with these plans and her own mental problems (Id. at 078-81).

When the jury began deliberating, it divided with eleven favoring acquittal on the charges and Ms. Stephenson, the single holdout for conviction (Id. at 079). The jury remained deadlocked for two
9 . See Stephenson letter, appellant's separate appendix at 078.

days. Finally, the jurors agreed to vote conviction on the first perjury count against appellant Mulligan, although some of the jurors were not convinced of appellant's guilt on that charge, in the hopes of thereby convincing the entire jury to vote for acquittal on the "more important [bank robbery] counts." (See letter of juror Bulos, appellant's separate appendix at 077). Immediately after the vote, four of the jurors wanted to change to a vote of acquittal, but were talked out of it by the other jurors (Stephenson's letter, appellant's separate appendix at 079).

When the jury was excused, juror Stephenson went directly to the prosecutor's office, where she spoke at length with the case agent and the prosecutor himself (see Stephenson letter, appellant's separate appendix at 078).

Several days after the verdict was rendered, one of the jurors wrote to the judge, expressing his distress at the compromise verdict, and stating that he had voted "guilty" on the third count although he was "not convinced of the guilt at all." (See Bulos letter, appellant's separate appendix at 077).

A few weeks later, Ms. Stephenson sent a lengthy letter to the prosecutor, expressing her affection for him and inviting him to visit her. She described her role on the jury as being like that of a supporter of a political candidate (the prosecutor), doing her part to help him achieve election victory. She described her preoccupation during trial with her own emotional problems, and asked the

prosecutor to help her in writing a book about "her character" Frank Smith, the government's principal witness in this case (see Stephenson letter, appellant's separate appendix at 078-81).

Upon the prosecutor's disclosure of this letter, the defense, with the court's permission, conducted a background investigation of Ms. Stephenson which revealed her prior criminal and civil proceedings.

10

The defense thereupon moved to set aside the verdict. Although the trial court summoned Ms. Stephenson, it refused to inquire of her at any length concerning the relevant issues, or to allow counsel to question her (transcript of August 18, 1977, set forth in appellant's separate appendix at 139-42). When Ms. Stephenson was put under oath, her first statement was that she had "no idea" why she had been asked to come down (Id. at 143). When the judge explained to her that it concerned her voir dire answers, however, Ms. Stephenson produced from her handbag papers relating to her prior assault charges (Id. at 145-46). When asked how she could have known to bring those papers if she had no idea why she had been summoned, she admitted that in fact the judge's secretary had told her that it concerned her voir dire answers (Id. at 148). She also admitted that she realized her denial at voir dire of any

10. The defense motion, supporting affidavit and memorandum are set forth in appellant's separate appendix at 227. The government's affidavit and memorandum in opposition are set forth at 242. Defendant's reply memorandum is at 320.

prior involvement in prior criminal proceedings "might be misinterpreted" in light of her prior assault charges.

Ms. Stephenson then stated that when the assault charges were dismissed, she was advised by her lawyer, Robert Dobrich, that if she was ever asked if she had been arrested or involved in criminal proceedings, she should answer "no". She also claimed that about that same time, she received a form to fill out concerning jury duty, and she specifically asked her attorney how this would affect her if she was called for jury duty. He said "You answer no." (Id. at 146). Ms. Stephenson also claimed, in response to the court's questions, that she didn't harbor any feelings against any party to this case, that she did not want to get on the jury so as to get back at the police department, and that the experience had not affected her impartiality (Id. at 146-47). Although she had testified at the civil proceeding that she had been chased and punched in the stomach by a postal employee, she claimed now that she did not regard herself as having been the victim of a crime during those events. Consequently, she had answered "no" when asked in voir dire if she had ever been the victim of a crime. (Id. at 149). Although defense counsel proposed a series of questions to test Ms. Stephenson's credibility, her competency and her possible prejudice against the defendant, the court refused to ask those questions (Id. at 148-153). The court then stated that it found Ms. Stephenson credible and unprejudiced and denied the defense motion to set aside the verdict (Id. at 154-55).

After speaking to Mr. Dobrich, Ms. Stephenson's attorney in her assault proceedings, the defense renewed the motion to set aside the verdict.¹¹ At a subsequent hearing, Mr. Dobrich testified that he had no recollection of his specific advice to Ms. Stephenson, but that, to the best of his recollection, he had never advised any of his clients, regardless of the disposition of their cases, that they could deny having been arrested (transcript of September 6, 1977 appellant's separate appendix at 184-5). Following Mr. Dobrich's testimony, the trial court again denied the defense motion to set aside the verdict.

11. This motion and supporting affidavit are set forth in appellant's separate appendix at 333.

POINT I

APPELLANT'S CONSTITUTIONAL AND
STATUTORY FAIR TRIAL RIGHTS
WERE VIOLATED BY THE PREJUDICE,
INCOMPETENCY AND MISCONDUCT OF
ONE OF THE JURORS.

At the commencement of the jury selection in this case, the prospective jurors were advised that one of the defendants was a New York City Police Officer. Thereafter, one of those prospective jurors, Virginia Stephenson, concealed the fact that she had previously been arrested, charged with a felony assault, searched, fingerprinted, and confined overnight in a precinct by members of that same police department. She thereby gained admission, without objection, to the jury. The parties and the court were also unaware that this juror had perjured herself under oath in a prior civil proceeding and had a history of psychiatric treatment. During the trial, Ms. Stephenson envisioned herself as a supporter in a campaign by the prosecutor, helping him to achieve a personal "victory" by convicting the defendants. During most of the two days of deliberations, she was apparently the sole holdout for conviction, finally inducing the rest of the jurors to end the deadlock by convicting on one perjury count. In her post-trial letter to the prosecutor, Ms. Stephenson revealed her infatuation for him, as well as her exhilaration at having provided him with a victory. She also described her preoccupation during the trial with her own mental and emotional problems and her hopes to capitalize on the conviction she had

obtained by writing a book with the aid of the prosecutor about the government's principal witness.

"In all criminal prosecutions, the accused shall enjoy the right to a ... trial, by an impartial jury ..." United States Constitution, Amendment 6. This provision entitles a defendant in a criminal proceeding to a trial in which "each and every one of the twelve members of the jury is totally free from any partiality whatsoever." Mares v. New Mexico, 490 P.2d 667 (Supreme Court of New Mexico, 1971); see also, Dennis v. United States, 339 U.S. 162 (1950); Sheppard v. Maxwell, 384 U.S. 333 (1966); United States v. Rattenni, 480 F.2d 195, 198 (2d Cir., 1973); Farese v. United States, 428 F.2d 178 (5th Cir. 1970); Gomila v. United States, 146 F.2d 372 (5th Cir. 1944); United States v. Hill, 332 F.2d 105 (7th Cir. 1964); Baker v. Hudspeth, 129 F.2d 779 (10th Cir., 1942). This Constitutional right is violated if even one juror is shown to be prejudiced. United States v. Rattenni, *supra*, 480 F.2d at 198; see also Parker v. Benson, 385 U.S. 363, 366 (1966); cf. United States v. Dioguardi, 492 F.2d 70, 85 (2d Cir. 1974) (Feinberg, J., dissenting). In judging claims brought under this provision, the courts have employed flexible tests adaptable to the facts of individual cases. Some courts, recognizing the difficulty of proof with regard to this issue, have afforded the defendant a new trial where the circumstances created a substantial possibility that one or more jurors were biased, without requiring the defendant to prove actual bias, or show how he was prejudiced. See e.g. United States v. Brown 179 F.Supp 478 (D.C.Cir 1960);

United States v. Rakes, 74 F. Supp. 645 (D.C.Va.,1948). In other cases, the decision of whether to grant the defendant a new trial has turned on whether the defendant was prejudiced. See, e.g., United States v. Muncy, 526 F.2d 1261 (5th Cir.1976); Jackson v. United States, 395 F.2d 615 (D.C.Cir.,1968).

In giving substance to this Constitutional protection, the jury voir dire procedure has been adopted and the defense is accorded the right to challenge prospective jurors, peremptorily or for cause (Rule 24, Federal Rules of Criminal Procedure). As the Supreme Court held in Frazier v. United States, 335 U.S. 497, 505 (1948):

[T]he right [to peremptory challenges] is given in aid of the party's interest to secure a fair and impartial jury ...

The test for judging whether this statutory right has been violated is somewhat different than the constitutional tests. When, as in this case, the claim of violation is based on the fact that certain information about a prospective juror's past was not available to the defense when it was deciding whether to challenge, then the question for the court is whether that information, if disclosed, "would probably have induced counsel to strike" the prospective juror from the panel. Carpenter v. United States, 100 F.2d 716, 717 (D.C.Cir.,1939); cf. United States v. Dioguardi, 492 F.2d 70, 85 (2d Cir.,1974) (Feinberg, J., dissenting). ("A person who was known to regard herself as clairvoyant would certainly not be allowed on a jury in the first place.") Conclusive proof of bias need not be

shown in order to satisfy this test. Rather, this court must take into consideration the fact that counsel will exercise his right to challenge peremptorily when the information about a prospective juror suggests even the possibility of bias.

Appellant Mulligan was denied his Constitutional right to a trial by an impartial jury. Equally important, he was not afforded the information regarding potential bias and other disqualifications of juror Stephenson which was requisite to exercising his right to challenge her during jury selection. As previously noted, appellant was a New York City Police detective. Consequently, the defense was particularly concerned during jury selection with the prior exposure potential jurors might have had to police or criminal proceedings. Any such exposure carried with it the possibility that the juror had thereby developed a bias against law enforcement officials which would manifest itself in bias against appellant Mulligan in this case. Both the questions suggested by defense counsel and the colloquies conducted by the trial court during the jury voir dire established the importance of this issue in jury selection. Thus, one prospective juror was dismissed by the court when she indicated that three members of her family were in law enforcement and that this might affect her ability to sit as an impartial juror (voir dire minutes, June 7, 1977 at 44). When another prospective juror stated that he had been a victim of a mugging, both sides expressed concern over the effect this might have had on his attitude toward New York City

police officers. Counsel for appellant Mulligan specifically requested the court to

... ask the prospective juror whether or not after the mugging he had dealings with the police department, whether that was pleasant or unpleasant, whether he remembers any of the individuals from the police department.

(Id. at 58)

It was only after the prospective juror explained that he had not reported the mugging and had not had any association with the police as a result of the incident that he was permitted to remain on the jury (Id. at 59). Another prospective juror who had been arrested twice on charges which were eventually dismissed, was called into the robing room for further questioning and then excused (Id. at 082-90). (See also the questions and colloquy, Id. at 11, 12, 14, 17, 18, 19, 20, 21, 25, 26, 33, 38, 39, 41, 54, 56, 57, 61, 63, 67, 70, 73, 74, 75, 77, 78, 81, 84, 87, 90, 94, 95, 97, 99, 100, 101, 103, 111-13, 114, 117, 121, 124, 125, 126, 128, as further evidence of the importance of this issue in jury selection in this case.)

Unbeknownst to the defense, one of the prospective jurors had had what could only have been a highly traumatic experience with the New York City Police less than four years ago. Virginia Stephenson, a middle aged, middle class woman had been charged with a felony assault. Rather than issuing an appearance ticket (New York Criminal Procedure Law §§110.10, 150.10 et seq.), New York

City Police Officers arrested her, presumably handcuffed her, took her to the 17th Pct., searched her, fingerprinted her, and confined her there overnight. The next day she was taken into criminal court by a police officer and arraigned on his sworn complaint.

This was obviously precisely the type of adverse experience with the New York City Police that defense counsel was most concerned about. This court could take judicial notice of the fact that arrest is a traumatic experience for anyone, but a first arrest on felony assault charges must have been particularly traumatic for this woman. The risk that an individual who has been through such an experience will harbor hostility against her custodians is substantial, particularly where, as in Ms. Stephenson's case, that individual has a history of mental problems. That Ms. Stephenson was particularly susceptible to such irrational hostilities is demonstrated by the fact that she physically assaulted a mail carrier because she thought that post office trucks were polluting her environment. That she harbored hostility over her arrest in this case is proven by the fact that she subsequently filed a counterclaim for false arrest in the civil suit initiated against her by the injured mail carrier.¹² Appellant was constitutionally and statutorily entitled not to have a member of his jury infected by such experiences.

12. See appellant's separate appendix at 284.

The district court appeared to believe that the question of whether appellant was entitled to a new trial depended primarily on whether juror Stephenson had perjured herself in concealing this information during voir dire. To the contrary, proof of perjury is not essential; rather, the fact that defense counsel was unaware of material facts relating to this juror's potential bias is sufficient to require that the jury verdict she participated in be set aside (See e.g., Jackson v. United States, 395 F.2d 615 (D.C.Cir., 1968)).

Appellant submits, however, that the fact that Ms. Stephenson willfully concealed her prior experiences with the police department and the courts is further proof of her bias. During the voir dire, Ms. Stephenson was specifically asked whether she had "ever been involved in a criminal proceeding?" Rather than describing her assault charges, Ms. Stephenson answered with an unqualified "No sir."¹³ There could not have been any serious question in Ms. Stephenson's mind that this question was designed to solicit des-

13. Juror Stephenson also answered other questions during voir dire in a less than forthright fashion. Thus when asked if she had ever had "any disputes with the United States," she answered "no." In so doing, she concealed the fact that she had assaulted a United States Postal employee (first dispute), was formally charged with that assault (second dispute), and was civilly sued by that federal employee (third dispute). Similarly, when Ms. Stephenson was asked in voir dire whether she had "ever been the victim of a crime," she again answered in the negative. This was contrary to her sworn testimony in the civil suit to the effect that she had not assaulted the postal employee, but rather, he had chased her and punched her in the stomach.

criptions of experiences such as hers. The court had previously advised the entire jury panel, including Ms. Stephenson, on no less than four occasions, that anyone who had "ever been involved" in "any kind of a criminal case" as a "defendant" should answer this question affirmatively (Voir Dire minutes, June 7, 1977, at 10, 17, 24-5, 35). Moreover, in questioning the other jurors in Ms. Stephenson's presence, the judge referred back to this definition six more times (Id. at 28, 63, 65, 67, 84, 97). Ms. Stephenson is a college-educated person who could reasonably be expected to know that a person who has been charged with a crime has been a "defendant" and "involved" in a criminal proceeding" even if that charge was eventually dismissed. Moreover, the documents relating to the criminal proceedings against Ms. Stephenson, many of which she obviously observed, repeatedly referred to her as the "defendant". (See appellant's separate appendix at 253 - "Complainant stated that the above defendant (listed as Stephenson, Ginger A.") did strike him ...; Id. at 254 - "The People of the State of New York vs. Ginger Stephenson, Defendant"; (Id. at 258 - "...the defendant Ginger Stephenson ... Deponent states ... that the defendant did with an unknown object strike one Joseph Scelza ..."; Id. at 259 - "The People of the State of New York vs. Ginger Stephenson ... Defendants are charged with a violation of P.L.120.05 Assault"; Id. at 260 - "The People of the State of New York vs. Virginia Stephenson, defendant";

Id. at 262 - "The People of the State of New York vs. Ginger Stephenson, Defendant"; Exhibit L - "Defendant's last name Stephenson first Ginny." Moreover, Ms. Stephenson was present in court for proceedings in her case on November 16, 1973 and November 17, 1973 when she was repeatedly referred to by her own attorney and the court as "defendant". (Transcript of these proceedings set forth in appellant's separate appendix at 254 and 262). It is therefore impossible that this juror did not know that she had been a defendant in a criminal proceeding.

After the defense filed its motion to set aside the verdict, the trial court summoned Ms. Stephenson and asked her why in light of her arrest on felony assault charges, she had denied at voir dire any prior involvement in criminal proceedings. Ms. Stephenson responded by claiming that she had been advised by her lawyer at the time the charges against her were dismissed that she could thereafter deny even having been arrested. This answer is suspect for several reasons. First, the New York statute nullifying criminal proceedings in the event of a dismissal (C.P.L. §160.60) was not enacted until 1976, more than two years after Ms. Stephenson claimed to have received this advice from her lawyer.¹⁴ Secondly, her lawyer testified that although he did not recall what advice he had given to Ms. Stephenson, he did not remember ever having told any client,

14. Ms. Stephenson testified that she received this advice at the same time that she got her fingerprints back from the police, which was in 1974. Since Ms. Stephenson also stated that she had received a "form" about jury duty around that same time, the trial court erroneously concluded that that "form" must have been her summons for duty in this case, and that the advice she described had therefore been given more recently, after CPL §160.60 was adopted.

even after the enactment of §160.60, that they could deny an arrest.¹⁵ Finally, Ms. Stephenson was advised by the trial judge's secretary, in advance of the post-trial hearing, that she was to be questioned at that hearing about her answers to the voir dire questions. She knew that her answer to the question about prior involvement in criminal proceedings "might be misinterpreted" and that she would therefore have to come up with some explanation as to why she had concealed information in answering that question. Moreover, she spoke to her own attorney immediately in advance of the post-trial hearing. Consequently, there is a substantial possibility that her answer to the judge's query was a recent fabrication to justify her voir dire answers. It is significant in this regard that Ms. Stephenson had previously lied under oath at the civil proceeding brought by the postal employee she had assaulted.¹⁶

In the context of this case, however, the question of whether Ms. Stephenson actually knew about the provisions of CPL 160.60 is secondary. Even if she believed that she could legally conceal her past experiences with the police and the courts from prospective employers and the like, her failure to disclose those experiences during the voir dire in this case was still indicative of bias.

¹⁵ . Interestingly, the statute specifically requires persons to disclose information about dismissed cases when questioned by a "superior court." Obviously, the district court's voir dire constituted questioning by a superior court.

¹⁶ . The civil court judge's opinion finding her testimony "incredible" is set forth in appellant's separate appendix at 284.

She was advised that this was a case involving a New York City police officer. She had heard prior prospective jurors specifically questioned about any experiences they had had with New York City police. Most importantly, when the prospective juror immediately before her was asked about prior involvements in criminal proceedings, he had answered that he had been arrested twice, even though both times the charges had been dismissed. Consequently, Ms. Stephenson knew that that juror had as much justification for concealing the fact of his arrests as she did. However, when that juror answered that he had been arrested, the trial court acknowledged the importance of his answer by taking him into the robing room for further questioning and then excusing him. Thus, it was abundantly clear to Ms. Stephenson that the court and counsel regarded such arrests as highly important, and that she was expected to disclose that information even though the charges had been dismissed. Consequently, her only real motive for concealing this information was because she feared that, like the prospective juror before her, she would probably be excused from the trial of this police officer if she disclosed it.

Other evidence of Ms. Stephenson's bias against the defendant surfaced during and after trial. On one occasion, as the jury was filing out of the courtroom, she blew a kiss toward the members of the prosecution team.¹⁷ Immediately after the jury was dismissed, this supposedly "impartial" juror proceeded directly to the

¹⁷ Although this incident was witnessed only by two defense attorneys, the fact that they called it to the court's attention long before Ms. Stephenson wrote her post-trial letter or the defense learned of her prior encounter with the police indicates that they did not make this incident up merely to discredit her.

prosecutor's office, where she spoke at length with the case agent and the prosecutor himself. Shortly thereafter, she wrote to the prosecutor¹⁸ indicating that, rather than serving as an impartial juror, she envisioned her role at trial as that of a partisan for the prosecution. Analogizing the trial to a political election campaign, she stated:

What happened to me as a juror was totally unexpected -- from the first gasp of surprise at being chosen, the exhilaration of the trial itself, the agony of deliberation, my tremulous talk with Agent Walker immediately following the trial, to the final moments in your office. I wish I could have spoken to you more extensively at that time. But the circumstances were not unlike being in the "inner office" of a candidate, whom you've worked for and believed in, at the moment of victory. There is little time to say much to those immediately surrounding the candidate -- but the thrill of just being there defied description. Thank you for letting me share in your "victory." I just hope you meant it when you said you were happy with our one count of perjury. I, of course, wish your victory had been complete. I wish we could have convicted on all counts.

In addition to her bias against the defendant, other factors which have been belatedly revealed about Ms. Stephenson further substantiate her incompetency as a juror. As previously mentioned, she testified falsely under oath in the civil suit brought against her by the postal employee she had assaulted. She was under

18. This letter is set forth in its entirety in appellant's separate appendix at 078-081.

19. See footnote 16 supra.

psychoanalysis for five years. Her post-trial letter to the prosecutor vividly portrays her mental and emotional problems. In it, she expresses an infatuation for the prosecutor:

It is difficult to formulate what I wish to say to you, tho' I am normally more facile at the written word than the spoken. I owe you a great debt of gratitude, Ira Block. A debt to be shared in part with Agent Walker, Mike Roche, Judge Owen, even my fellow jurors, and yes, "my character," Frank Smith. But it is you who stand out in greatness.

* * *

... But Ira (I hope you don't mind my calling you Ira. I do feel rather close to you after all this)...

* * *

Am enclosing my card. Please give me a call at your earliest convenience. Or, if you're ever in the neighborhood drop in for a cup of coffee (altho' I don't drink that either, but I'll settle for a Coke) -- I'd still like very much to talk with you.

* * *

Again, Ira Block, I thank you -- for so very much.

The letter further revealed that, rather than focusing on the evidence, this juror was preoccupied during trial with her own problems:

You restored conviction (or, faith, if you will) to a fellow human being. That is greatness. You succeeded in doing something that five years of analysis with a brilliant doctor could not do.

As I told you, the weekend before our final deliberations on Monday, I literally descended into hell. I dredged up five years of analysis and then some. I went through a com-

plete catharsis of the soul. It was not pleasant. And I had to do it alone. But I came out a different person -- or more accurately, the person I once was.

I regained my self-confidence. I believed, for the first time in years, in myself (my talent, my ability, my system of values). I believed with all my heart that I was right, despite the fact that eleven other people said I was wrong.

The bulk of the letter describes Ms. Stephenson's desire to capitalize on the conviction she had secured by inducing the prosecutor to aid her in writing a book about the government's principal witness in this case:

But the most important thing (selfishly, perhaps) to come out of all this is that I've begun to write again ...

Friday, July 1, was my birthday. And for the first time in years I felt it was a real birth-day. And it was a happy one. I was the me I started out to be. I'm writing again! Eagerly. Avidly. With enthusiasm! I am deeply involved in a project I firmly believe in (my Frank Smith book). Thank you, Ira Block -- that's a heck of a birthday present!

Remember when I spoke to you the Friday following the trial? You said you'd speak to Smith's attorney the next week, but I said, "No, there's too much preliminary work to be done first." Actually what I was saying was that I had to be sure of me first. That this wasn't just some transitory thing. "Post-trial exhilaration syndrome", if you will...

You were right. I'm not going to get anything out of the newspapers that I don't

already know... I'm ready now, Ira. I convinced I can do it!

She then proceeded to ask the prosecutor to do certain favors for her:

So, you, to whom I am already so deeply indebted, I turn to and ask, "May I extend that debt a little further?"

She requested that the prosecutor help her get in touch with Frank Smith's attorney, that he advise her if Mr. Smith was going to testify in any future trials, that he provide her with "leads" for her book and that he help her gain access to the transcripts of Mr. Smith's testimony from prior trials. The last full paragraph of the letter is indicative of its general tenor:

It's getting very late -- and sitting in an un-airconditioned, un-windowed office tends to make the Muse's voice a little hoarse. But Ira, we've got one hell of a book! And just think, the government's going to get its money back triple fold. First I'm going to pour my "jury money" back into the economy by buying an electric typewriter for my apartment (already have one picked out). Next, we make enough money on the royalties and Frank Smith will never have to rob another bank. Next, we make that much money on royalties, as a single person, non-head-of-household-type tax payer the government's going to rob me! Which may make me want to go out and rob a bank -- which will pay the salary of some assistant US prosecutor, not to mention countless FBI agents. So, you see, one way or the other, it's all for the good of the country!

It is of some relevance to this appeal that Congress and the Courts have acknowledged a correlation between mental stability and jury qualification. 28 U.S.C. §1865(b)(4) provides for the disqualification of potential jurors who are "incapable, by reason of

mental ... infirmity, to render satisfactory jury service..." See e.g., Jordan v. Massachusetts, 225 U.S. 167 (1912). In the present case, the tenor of Ms. Stephenson's letter, the mental and emotional problems she described, and the fact of her lengthy period of admittedly unsuccessful psychoanalysis, all suggest that it was difficult, if not impossible for her to function as a fair and impartial juror.

Coupled with the evidence of her bias, her perjury in the civil court proceedings and her plans to capitalize financially on the conviction, these factors clearly establish that Ms. Stephenson's presence on this jury violated appellant's right to fair and impartial deliberations by competent jurors. Clark v. United States, 289 U.S. 1 (1933); United States v. Floyd, 496 F.2d 982, 998 (1974); Jackson v. United States, 395 F.2d 615 (D.C.Cir.1968); United States ex rel. DeVito v. McCorkle, 248 F.2d 1 (3d Cir.1957); United States v. Lampkin, 66 F.Supp. 821 (S.D.Fla,1946); cf. Mikus v. United States, 433 F.2d 719 (2d Cir.1970).

In light of this evidence of bias, incompetency and misconduct, the district court was clearly in error in concluding that appellant was not prejudiced by Ms. Stephenson's presence on the jury. The brief interview the court conducted with Ms. Stephenson clearly did not constitute the hearing to which appellant was entitled. See, e.g., Remmer v. United States, 347 U.S. 227 (1954); United States v. Hand, 472 F.2d 162 (5th Cir.,1973); United States v. Silverman, 449 F.2d 1341 (2d Cir.1971); United States ex rel. Owen v. McMann, 435 F.2d 813 (2d Cir.,1970). The trial court refused to ask most of the questions suggested by counsel concerning the facts relating to her arrest and detention, the credibility of the reason she gave for concealing the fact of her arrest during voir dire, and other issues. The court also refused to allow defense counsel to question

Ms. Stephenson. Rather, the court limited the inquiry to eliciting from Ms. Stephenson brief explanations of why she had answered as she did in voir dire, and asking her in general terms whether she was biased by her experiences. This Court has itself recognized "the normal juror's disinclination to impeach his rendered verdict..." United States v. Rattenni, supra, 480 F.2d at 198; see also, United States v. Rakes, supra, 74 F.Supp. at 648 . This was especially true in this case, where Ms. Stephenson, in her letter, expressed a vested interest in preserving this prosecutor's "victory", thereby repaying her "debt" to him as well as protecting her own literary prospects. Consequently, Ms. Stephenson's self-serving denials of prejudice were as unenlightening as they were predictable. Particularly since no follow-up questions were asked to determine the credibility of those denials, they cannot serve to contradict the substantial evidence of bias and incompetency which exist in this record.

The government cannot dispute that this was a close case in the eyes of the jurors who sat on it. The first jury deadlocked on all counts and a mistrial was declared. At the second trial, the jury remained deadlocked through two days of deliberations and an Allen charge. According to juror Bulos, the final verdict was a compromise, with at least some of the jurors unconvinced of appellant's guilt. Ms. Stephenson herself admitted that through most of the deliberations she was the only hold-out for conviction on some, and perhaps all, of

the charges.

Given the "crucial importance of protecting the integrity of the trial process," this Court, when confronted with evidence of possible jury bias, has not hesitated to order a new trial, even though the proof of guilt was overwhelming. See, e.g., United States v. Rattenni, supra, 480 F.2d at 198. Here, the closeness of the case and the pivotal role Ms. Stephenson played in the deliberations require that special emphasis be given to the proof of her bias, incompetency and misconduct. As a result of his conviction, appellant Mulligan has been sentenced to a substantial term of incarceration. Before he can be subjected to such punishment, he is constitutionally entitled to have the question of whether he is guilty resolved by an impartial jury of competent individuals. By virtue of juror Stephenson's adverse experience with the New York City police, her assaultive behavior, her criminal and civil court proceedings, her perjured testimony in civil court, her mental instability, her concealment of information during jury voir dire, her infatuation with the prosecutor in this case, her preoccupation with her own mental problems during trial, and her hopes to capitalize financially on appellant's conviction, appellant was denied this fundamental right. The verdict so rendered should be set aside and a new trial ordered.

POINT II

THE DISTRICT COURT ERRED IN REFUSING TO ALLOW THE JURY TO CONSIDER THOSE PORTIONS OF APPELLANT MULLIGAN'S GRAND JURY TESTIMONY WHICH WERE ALLEGED TO BE PERJURIOUS IN THE CONTEXT OF THE REST OF HIS TESTIMONY.

Count three (of which appellant was convicted) and count five of the indictment charged that appellant Mulligan had perjured himself in sworn testimony before the grand jury. Specifically, count three charged that he had committed perjury when he testified that he did not recognize the name, nickname or photograph of John Cerasani. Count five charged that he had perjured himself when he testified that he did not recognize the names "Frank Smith" or "Martin Shannon".²⁰

At trial, the government was permitted by the court to limit the portion of appellant's grand jury testimony which was disclosed to the jury to the introductory warnings by the prosecutor and the specific questions and answers alleged in the indictment to be perjurious. The trial court denied appellant's repeated requests to have other portions or all of appellant's grand jury testimony provided to the jury so that the veracity of the challenged portions could be judged in the context in which they were given (963, 994, 1277).²¹

20. Counts four, six and seven of the indictment were redacted prior to trial.

21. Appellant Mulligan's grand jury testimony is set forth in its entirety in appellant's separate appendix at 336. At one point in the proceedings, the court agreed, with the concurrence of government counsel, to permit appellant to introduce an additional seventeen lines of grand jury testimony. Appellant declined, explaining that without more, that small additional portion of testimony would be meaningless (999-1005).

The government apparently opposed allowing the jury to see the rest of this grand jury testimony precisely because of its contextual impact. The obvious truthfulness of those sections, as established by the government's own evidence at trial, tended to bolster the credibility of the challenged portions. Thus, evidence at the trial confirmed appellant Mulligan's grand jury testimony that he knew Joseph Gernie (Grand Jury testimony, appellant's separate appendix at 345; confirmed at trial, trial transcript at 200, 620, 1270-73), that he had a cousin named Maureen who had dated Gernie (Grand Jury testimony, appellant's separate appendix at 345; confirmed at trial, trial transcript at 620, 1268-70), that he had another cousin named John who had had a fight with Gernie (Grand Jury testimony, appellant's separate appendix at 345-6; confirmed at trial, trial transcript at 1268), that Mulligan himself had had an argument with Gernie (Grand Jury testimony, appellant's separate appendix at 346, confirmed at trial, trial transcript at 1270-71), and that Mulligan had thereafter been at social functions which Gernie had attended, but had not spoken to him (Grand Jury testimony, appellant's separate appendix at 346-7; confirmed at trial; trial transcript at 1272-3). Similarly, the evidence at trial confirmed appellant Mulligan's grand jury testimony that he had been on vacation from November 29 until December 13, 1971 (Grand Jury testimony, appellant's separate appendix at 348-9; confirmed at trial, trial transcript at 1073), that he was assigned to the 20th Detective Squad in November, 1971 (Grand Jury testimony, appellant's separate

appendix at 350; confirmed at trial, trial transcript at 1068), that he had been part of a police stakeout of the bank at 70th Street and York Avenue (Grand Jury testimony, appellant's separate appendix at 352; confirmed at trial, trial transcript at 509-515, 522, 563), and that as a result of that stakeout, arrests were made (Grand Jury testimony, appellant's separate appendix at 353-4; confirmed at trial, trial transcript at 512). The evidence at trial also confirmed appellant Mulligan's grand jury testimony that he had a summer cottage at Lake Hopatcong (Grand Jury testimony, appellant's separate appendix at 357; confirmed at trial, trial transcript at 1277-78). The answers appellant Mulligan gave to some of these questions, particularly his admission that he knew Gernie and was familiar with the bank which had been robbed, were potentially highly incriminating. A jury might properly wonder why someone who had truthfully answered those questions would turn around and perjure himself when asked merely if he recognized certain other persons.

It is a fundamental principal both at common law and in federal practice that when a portion of a document or oral statement had been introduced into evidence, "the doctrine of completeness require[s] that the entire statement be produced." United States v. Katz, 78 F.Supp. 435, 440 (D.C.Pa.,1948); see, also, Wigmore on Evidence, 3d Ed., Section 2113; 22 C.J.S., Criminal Law, Section 769; Affronti v. United States, 145 F.2d 3, 7 (8th Cir.1944); Philadelphia & R. Ry Co. v. Bartsch, 9 F.2d 858 (2d Cir.,1925); United States v. Angelo, 153 F.2d 247 (3d Cir.1946); United States v. Maggio, 126 F.2d 155, 160 (3d Cir.1942). Even in those cases where the exclusion of a part of the grand jury testimony was found permissible, this Court has stressed that the portion which the offering party

seeks to introduce must be presented sufficiently in context to allow the trier to have an accurate notion of what was said and under what circumstances. United States v. Capaldo, 402 F.2d 821 (2d Cir. 1968); United States v. Rosenblum, 339 F.2d 473 (2d Cir., 1964); see also, United States v. Johnson, 165 F.2d 42 (3d Cir. 1947).

The doctrine of completeness has been held to apply with special force in cases raising issues similar to those in the present proceeding. Where, as here, the veracity of the individual who made the statement is at issue, the courts have invariably held that the entire statement should be admitted. Thus, in United States v. Weinbren, 121 F.2d 826 (2d Cir. 1971), this Court held that where a portion of a witnesses' police report had been introduced, the remainder was admissible

in order that the jury might determine for itself whether the report as a whole did adversely affect the veracity of the witness.

See also Delmore v. Brownell, 135 F.Supp. 470, 479 (D.C.N.J. 1955). Similarly, in those instances where a portion of a witnesses' statement is introduced for impeachment, the remainder is admissible to rehabilitate him. See, e. g., United States v. Affonrti, supra, 145 F.2d at 7; United States v. Katz, supra, 78 F.Supp. at 440; Hoeffner v. Western Leather Clothing Co., 161 S.W.2d 722, 731 (Mo. 1942). Finally, fundamental fairness as well as precedent dictates that when the prosecution seeks, as in this case, to introduce allegedly incriminating portions

of a defendant's statement, the exculpatory portions must be admitted also. See, e.g., Williams v. State of Maryland, 109 A.2d 89, 91 (Md.1954); Nevada v. Skaug, 161 P.2d 708 (Nev.1945); See also, North Carolina v. Kelly, 6 S.E. 2d 533 (N.Carol.1940); North Carolina v. Coffey, 44 S.E.2d 886 (N.Carol.1947); North Carolina v. Justice, 165 S.E.2d 47 (N.Carol.1969); Illinois v. Hurry, 52 N.E. 2d 173 (Ill.1943).²²

As previously noted, the deadlock at the first trial and the lengthy deliberations and compromise verdict at the second trial establish that this was a close case. The practical effect of permitting the government to excerpt the grand jury minutes is obvious. At the first trial, where the jury was presented with all of appellant's grand jury testimony and could see that most of his answers were corroborated by the government's own evidence at trial, they were unable to conclude that appellant had perjured himself. The second jury, deprived of that evidence, eventually convicted the appellant of that charge. Since the remainder of the grand jury testimony was wrongfully excluded, a new trial should be ordered.

22. In the present case, one of the reasons the judge gave for excluding the rest of appellant's grand jury testimony was that it was exculpatory and therefore "self-serving." (1003).

POINT III

THE DISTRICT COURT ERRED IN
WITHDRAWING TWO OF THE ELEMENTS
OF THE CRIME OF PERJURY FROM
THE JURY'S CONSIDERATION.

The district court properly instructed the jury that the government was obliged to prove four essential elements of the crime of perjury:

1. That Mr. Mulligan took an oath to testify truthfully before a United States grand jury in the Southern District;
2. That he made false statements as to matters about which he testified under oath are charged in the indictment;
3. That those false statements were willfully made in that at the time he made them he knew them to be false;
4. As to the matters which it is charged he made false statements, those matters were material to the issues under inquiry by that grand jury.

However, the court then improperly withdrew two of these elements from the jury's consideration:

In this case, as the evidence shows, and there is no serious dispute, Mr. Mulligan did appear before a grand jury for the Southern District of New York and took an oath that he would testify truthfully and that such grand jury was authorized by law to administer oaths ... I charge you as a matter of law that the matters as to which Mr. Mulligan was asked as set forth in the indictment were material to the issues under inquiry before the grand jury before which the testimony was given. Therefore, you need not concern yourself with either the first or the fourth elements with which I have just outlined for you. You should direct your attention to the second and third elements.

The removal of any element of the crime charged from the jury's consideration is fundamental error of constitutional dimension. See, e.g., United States v. Dickerson, 508 F.2d 1216, 1219 (2d Cir.1975); United States v. Howard, 506 F.2d 1131, 1133-34 (2d Cir.1974); United States v. Clark, 475 F.2d 240, 249 (2d Cir.,1973); United States v. Fields, 466 F.2d 119, 121 (2d Cir.1972); Byrd v. United States, 342 F.2d 939 (D.C.Cir.1965). The trial judge apparently assumed that he could instruct the jury to disregard these elements based on his conclusion that they had been conclusively established. Appellant respectfully submits that this assumption was erroneous both legally and factually. Legally, the trial judge's evaluation of the evidence is not controlling in a jury trial. As this Court held in United States v. Howard, supra, 506 F.2d at 1134:

When Howard exercised his constitutional right to a jury, he put the Government to the burden of proving the elements of the crimes charged to a jury's satisfaction, not to ours or the district judge's. Thus, even if we believe that there was over whelming proof of the elements not charged, we must still reverse.

Moreover, factually, the evidence was not conclusive, particularly on the element of materiality. Count three, the only count on which appellant was convicted, charged that he had perjured himself when he testified before the grand jury that he did not recognize the name, nickname, or photograph of John Cerasani. That grand jury was investigating the bank robbery subsequently charged in counts one and two

of the indictment in this proceeding. John Cerasani was appellant's co-defendant in the trial below. Since the jury deadlocked eleven to one in favor of acquittal on the charges that appellant and John Cerasani participated in that bank robbery, that same jury might well have concluded, if the issue of materiality had not been withdrawn from them, that the question of whether appellant knew Cerasani was not material to the grand jury investigation of that robbery. In any event, it was appellant's constitutional right to have the jury determine whether these elements had been proven beyond a reasonable doubt.

At the first trial, the judge withdrew the issue of materiality from the jury's consideration over the express objection of appellant's counsel (transcript of the first trial at 1552). The judge at the second trial took note of the first judge's decision on this matter and stated that he would do likewise (1369). The judge thereafter refused to change this position, even though government counsel advised him that it was improper to withdraw an element from the jury's consideration (1369). Thus, the trial court was afforded a reasonable opportunity to rule on this issue. Clearly, any further objection by defense counsel would have been both redundant and futile. This was not a case where defense counsel may have wished this issue removed from the jury's consideration as a matter of trial strategy (compare United States v. Pravato, 505 F.2d 703 (2d Cir.1974)).

Moreover, the removal of an element of a crime from the jury's consideration has repeatedly been held to constitute plain error, requiring reversal even in the absence of an objection by counsel. See, e.g., United States v. Howard, supra; United States v. Clark, supra; United States v. Fields, supra. Consequently, the verdict should be set aside and the case remanded for a new trial.

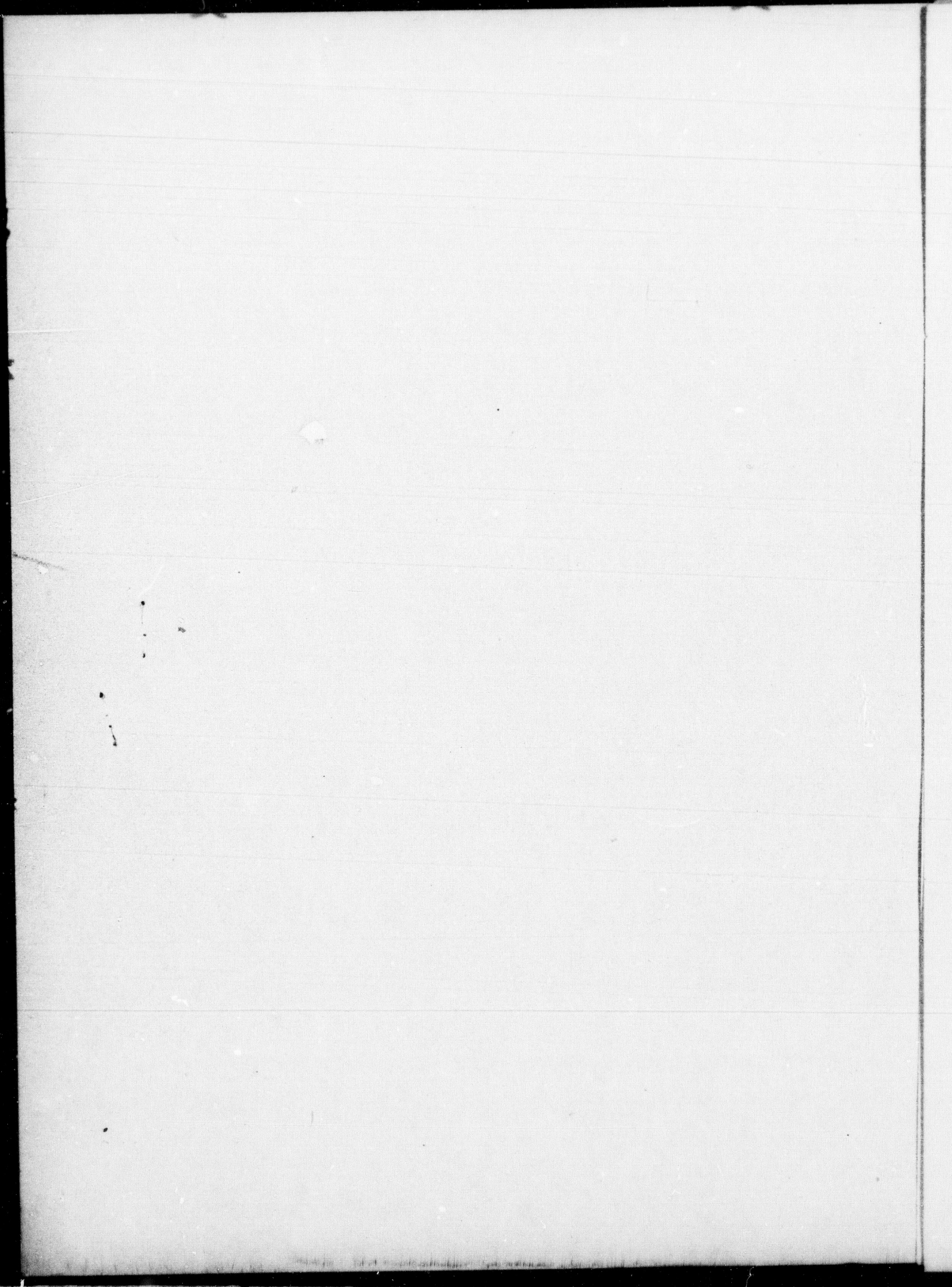
CONCLUSION

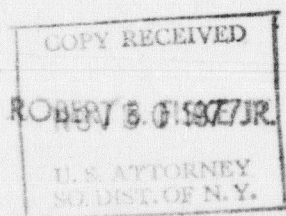
FOR THE ABOVE-STATED REASONS,
THE VERDICT SHOULD BE SET
ASIDE AND THE CASE REMANDED
FOR A NEW TRIAL.

Respectfully submitted,

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